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No. 87-703

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

WILFRIED VAN CAUWENBERGHE,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT
OF PETITION FOR CERTIORARI

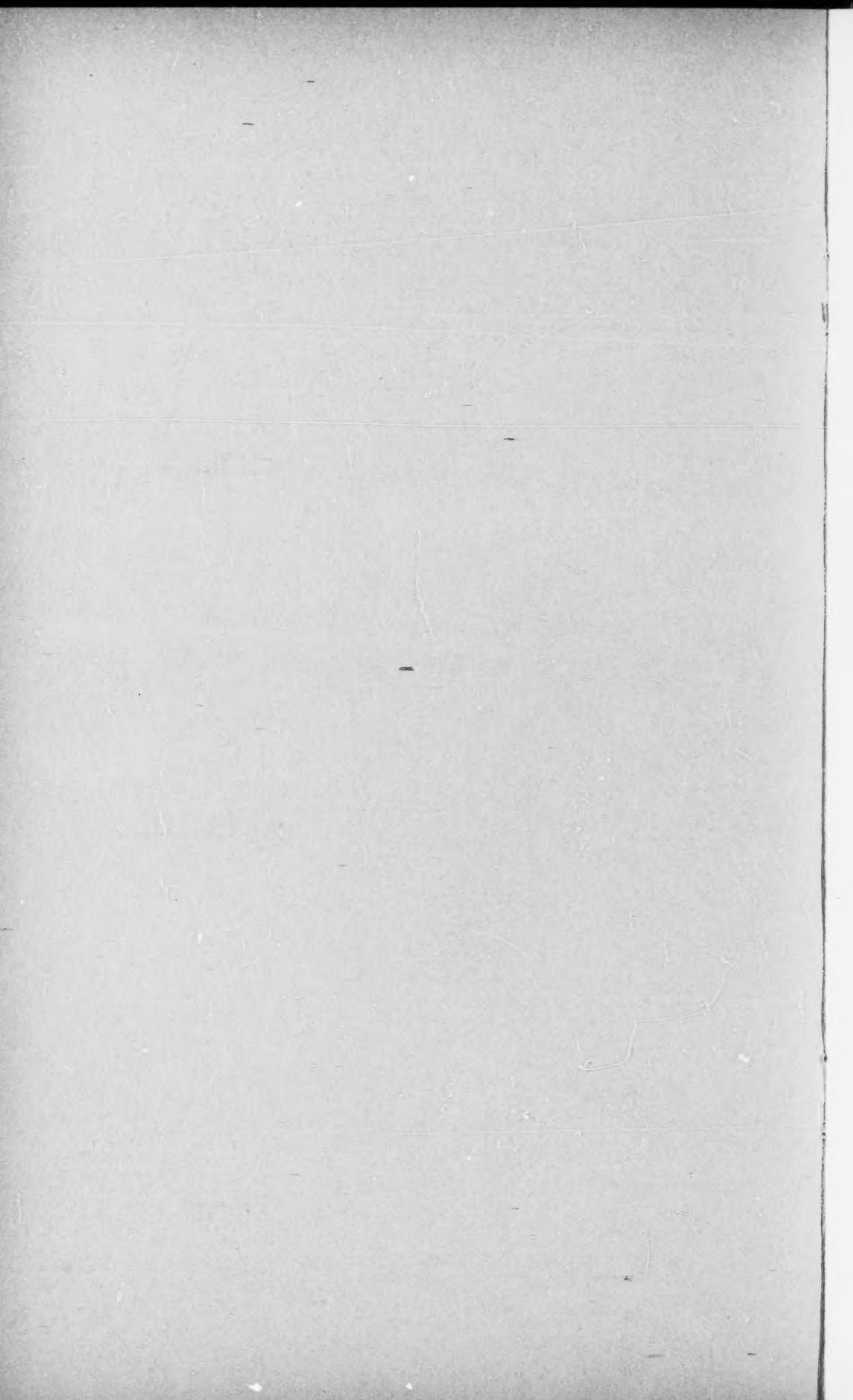
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Petitioner respectfully calls to the Court's attention, pursuant to Rule 22.6, a new decision of the Second Circuit noted in the most recent *U.S. Law Week*. In it, both the majority and the dissent agree that the Constitution does not permit the seizure and retention of a defendant's property that is unrelated to any crime, based merely on an indictment—*i.e.*, exactly what happened here. This brings to three the number of Courts of Appeals in conflict with what the Ninth Circuit in the present case allowed.

In *United States v. Monsanto*, No. 87-1397 (2d Cir. Dec. 21, 1987), copies of which have been lodged with the Clerk, the Second Circuit (Judge Mahoney joined by Judge Cardamone), while noting analytical disagreement with other courts on other points, held that the Fifth Amendment requires that "[i]f the government cannot demonstrate the likelihood that a jury would find the assets to be the proceeds of crime, the interest of the defendant in using the property to retain counsel of choice should prevail." Slip op. at 665. (In the present case the Government never even attempted to claim that petitioner's property was forfeitable, but rather argued that the Government could seize it anyway in anticipation of payment of fines and restitution in the event of conviction.) The Second Circuit also stated that even when there was a statute allowing forfeiture (as there was not here),

"we are . . . disinclined to postulate an absolute rule allowing the government to impose indigence and deprive . . . defendants of the opportunity to retain private counsel merely by obtaining an indictment." *Id.* at 660.

Judge Oakes, dissenting, would have gone further, and would not have allowed such seizure even if a hearing established likely forfeitability under a forfeiture statute. He wrote that "The Sixth Amendment is implicated not only on the individual level of the particular defendant, but also on the institutional level of the criminal justice system as a whole." *Id.* at 669. He concluded that seizure of a defendant's property needed to pay counsel "shakes the very foundations of our criminal justice system." *Id.* at 673.

CONCLUSION

For the reasons stated here and previously, certiorari should be granted. In order that the case may be heard in tandem with No. 87-336, petitioner would request a slightly accelerated briefing schedule if necessary to permit argument this Term.

Respectfully submitted,

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